Date: August 16, 1996
Case No.: 95-INA-00069

In the Matter of:

CITY OF DANBURY, ENGINEERING DEPARTMENT,
Employer

On Behalf Of:

FARID LAFI KHOURI,
Alien

Appearance: Laszlo L. Pinter, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 11, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of Engineer I (structural) at the yearly wage of $37,919 (AF 51-52). The Employer required five years of experience in the job offered, including three years of public works engineering. On March 21, 1994, the CO issued a Notice of Findings ("NOF"), in which he concluded that the Employer was in violation of the regulations at 20 C.F.R. § 656.21(b)(6) and § 656.21(b)(1)(i)(I) (AF 18-20). On April 20, 1994, the Employer submitted its rebuttal response (AF 11-17). On August 16, 1994, the CO issued a Final Determination denying labor certification for the Alien named herein (AF 9-10).

On September 23, 1994, the Employer submitted a Motion for Reconsideration, which was denied by the CO on September 26, 1994 (AF 1-8). The CO then forwarded this matter to the Board of Alien Labor Certification Appeals for review. On November 30, 1994, the Employer submitted its request for reconsideration argument in support of its appeal.

Discussion

In his NOF, the CO stated that the Employer must document that its requirements for the job opportunity represent the Employer's actual minimum requirements for the job opportunity, and that it must establish that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity, or that it is not feasible to hire workers with less training or experience than that required by the Employer's job offer. See § 656.21(b)(6). Specifically, in the NOF, the CO asked the Employer for documentation showing how the Alien meets the requirement of five years of experience. The CO also instructed the Employer to document that the job opportunity has been, and is being described without unduly restrictive job

[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

requirements. See § 656.21(b)(2).

Where the alien does not meet the employer's stated minimum job requirements, certification is properly denied under § 656.21(b)(6). *Marston & Marston, Inc.,* 90-INA-373 (Jan. 7, 1992). An employer must establish that the alien possesses the stated minimum requirements for the position. *Charley Brown's,* 90-INA-345 (Sept. 17, 1991). The Alien's resume indicates that he has been employed by the Employer as an Engineer I since December 1986 (AF 54). Prior to this employment, the Alien worked as an assistant coordinator at the materials laboratory at Northwest University for seven months and also spent four months supervising public building construction for a company in Kuwait. Therefore, the requisite five years of experience in the job offered was reached, almost exclusively, in his work with the Employer named herein. Where an alien gains experience with the employer, that work can only constitute qualifying experience if it was in a job that was "sufficiently dissimilar" to the job offered. *Brent-Wood Products, Inc.,* 88-INA-259 (Feb. 28, 1989) (*en banc*). Factors to consider when determining whether jobs are sufficiently dissimilar include, but are not limited to, the relative job duties, supervisory responsibilities, and job requirements of the positions; the positions of the jobs within the employer's hierarchy; the employer's prior employment practices; whether and by whom the "higher" position has been filled previously; whether the "higher" position is newly created; the percentage of time spent performing each job duty in each job; and, the respective salaries or wages. *Delitzer Corp. of Newton,* 88-INA-482 (May 9, 1990) (*en banc*).

The Alien describes his job duties as an Engineer I as follows:

> Design, analyze, inspect with construction coordination & administration of civil/structure municipal Public Works projects. Review monthly projects requisitions, attend job meetings, follow up on work change orders resolutions & report progress work for City Engineer, Prepare & review bidding legal contract documents, technical specifications and cost estimate for civic structure inventory & appraisal reports with AASHTO rating. Store reports in computer & establish yearly comprehensive report including structural defects and maintenance recommend [sic] Evaluate streets & highway pavements through a computerized engineering management programs.

The Employer described the job duties for the position for which certification is sought, Engineer I (structural), as follows:

> The review, evaluation and design of the various structural components used in construction and public works facilities. The design, construction and inspection of varied public works projects. The reading and interpretation of a variety of

technical engineering maps, designs, and prints. The preparation of clear and comprehensive reports.

The description of the Alien's job duties set forth above are not clearly distinguishable from the job duties listed on the application for labor certification, except that they are more expansive than the duties listed by the Employer. In fact, the Alien's job description appears to be a more detailed form of the job description for the position for which certification is sought, and includes descriptions of substantial structural work. The Employer's rebuttal argument that the job opportunity is a new position is not persuasive. In regard to the Alien, the Employer stated as follows:

> [The Alien's] job experience with this employer is merely coincidental with what the municipality feels is a bona fide job qualification - that of relevant, qualified knowledge of public works engineering necessary in order to perform the function within this job position. There is little sense in losing this significant expertise as the position would be better served with the fundamental knowledge brought to the job by one with experience vs. One without. [Emphasis in original.]
>
> The needs of the Engineering Department are different now from what they were in 1986 when [the Alien] was hired. The Engineer I (Structural) is a new position for which [the Alien] is an applicant. In 1986 when [the Alien] was hired there were four (4) Engineer I positions in the City's table of organization. Today there are two including the position of Engineer I (Structural) the job opportunity in question.

We find that the Employer's rebuttal fails to document that the Alien's years of experience while in its employ constituted work in a sufficiently dissimilar job. The Employer fails to discuss the difference in job duties, pay, responsibility, or supervisory duties. The Employer argues that there were four engineering positions when the Alien was first hired, but that there "are now two including the position of . . . the job opportunity in question." Rather than distinguishing the two positions, the Employer's argument supports a finding that they are substantially the same with a different name. A difference in job titles alone does not establish sufficient dissimilarity. *Yasufumi Enterprise, Inc.*, 89-INA-357 (Mar. 28, 1991). Moreover, in this case, the difference in job title is minimal. Furthermore, the Employer's argument that on one hand the Alien's experience in its company is coincidental, and then on the other hand that it is that experience that gives the Alien an added qualification, further defeats its application for labor certification. An employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991).

In its brief, the Employer argues that the CO's NOF did not require a detailed explanation in regard to the issue of whether the Alien's earlier position is sufficiently dissimilar to the job opportunity for which labor certification is sought. Accordingly, the Employer states its argument in regard to the issue of the Alien's earlier experience with it should be considered as part of this matter, rather than remanded for further findings.

In the NOF, the CO stated as follows:

> When the employer has employed or currently employs the alien in the occupation for which certification is sought, the application for alien employment certification cannot include as a job requirement experience gained by the alien in that occupation while working for the employer. This is a valid exclusion since that experience was not required for the job when the alien was hired.
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> * * *
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> It should also be documented how the alien meets the minimum requirement of 5 years experience with 3 of the years in Public Work engineering. As stated above, experience gained with the employer cannot be included as the other applicants for the position were not subject to the same opportunities.

We conclude that the CO gave sufficient notice to the Employer that the validity of the Alien's work experience with the Employer was in issue. The standards for establishing that the Alien has legitimately obtained the necessary work experience while employed by the Employer are clearly set forth in the cases arising under our jurisdiction. Nonetheless, notwithstanding our finding that the CO gave clear notice of the deficiency in the NOF, consideration of the argument contained in the Employer's request for review does not change our conclusions. In that document, the Employer states, in general, that the five years of experience the Alien gained while in its employ is experience that can be applied to the minimum requirements because:

> (1) the incumbent was originally hired for a position substantially dissimilar from the current position in function and responsibilities and
>
> (2) that because of budgeting and personnel constraints and the legal obligations it must satisfy with respect to public health and safety, it is not feasible to hire a worker with less training or experience.

The first component of the statement fails to address the specific factors, detailed above, that can establish that the earlier position is dissimilar from the position for which labor certification is sought. The second component provides no documentation or specific details to

show that there has been a change in circumstances. Accordingly, having considered all arguments and evidence submitted, I find that the Employer has failed to establish that the requirements set forth in the application for labor certification are the actual minimum requirements for the job.

The CO's denial of labor certification must, therefore, be AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 1996, for the Panel:

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Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service

of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.